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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

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No. 339

MONTICELLO TOBACCO COMPANY, INC.,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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MONTICELLO TOBACCO COMPANY, INC., *Petitioner,* *v.* THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT, *Respondents.*	No.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Monticello Tobacco Co., Inc., plaintiff below, prays that this Court issue a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York dismissing petitioner's complaint at the close of petitioner's case in a trial to the court and a jury.

Opinion Below

The opinion of the Second Circuit Court of Appeals is not yet reported, and is printed at R. 4289 to 4297. The District Court did not write an opinion.

Jurisdiction

The judgment of the Second Circuit Court of Appeals was entered on the 19th day of June, 1952. Petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. Section 347(a)) and Rule 38 of the Revised Rules of this Court.

Questions Presented

I. (a) Must the plaintiff in a treble-damage action under Sections 4 and 5 of the Clayton Act establish *prima facie* by direct evidence its claim that the defendant cigarette manufacturers caused its exclusion from competition through the refusal of the distributors' controlled by them to buy, deal in, or distribute plaintiff's cigarettes rather than by circumstantial evidence sufficient to enable a jury to infer such exclusion, in view of the following circumstances:

Prior to institution of plaintiff's suit, the defendants were convicted of violations of the anti-trust laws, *The American Tobacco Co., et al.* v. *United States.*, 328 U. S. 783, 798, the jury in the antecedent criminal case having found merely on circumstantial evidence that the defendants had the power and intent to exclude competition in the tobacco industry, monopolized to a substantial degree the cigarette market and conspired to exclude undesired competition, to fix and control prices, and to fix and control other material conditions relating to the distribution and sale of cigarettes; the Government, however, not having offered any evidence and there being no direct determina-

tion that a competitor was actually excluded by being barred from the market?

(b) Is such a plaintiff not entitled, as part of its *prima facie* case, to present to the jury the final judgment of conviction in the criminal case, to establish by estoppel defendants' power and intent to exclude competition and, as to numerous other facts by collateral estoppel, to obtain as large an advantage as the estoppel doctrine would afford had the Government brought suit, in accordance with the rule of *Emich Motors Corp., et al.* v. *General Mortors Corp., et al.,* 340 U. S. 558, 568 and 569?

(c) Does such a plaintiff have the burden, as part of its *prima facie* case, to prove that the defendants caused the actual exclusion from the market of competitors other than the plaintiff, in the absence of a direct determination of that fact in the antecedent criminal case?

II. In making its *prima facie* case, was petitioner prejudiced by the action of the District Court

(a) striking out all of the testimony of Professor Tennant, an expert or well-informed person, and all exhibits received in evidence in the course of his testimony, which were offered by petitioner to demonstrate conditions in the cigarette industry and to assist the jury in finding petitioner's damages; and

(b) excluding testimony by Frank Riggio concerning sales of the Regents cigarette by the Riggio Tobacco Corp. and its net earnings?

III. Was dismissal of petitioner's complaint on the merits erroneous because

(a) the courts below made assumptions of fact and created a presumption of innocence in favor of the defendants and distributors of cigarettes, some of whom were called as hostile witnesses by petitioner;

(b) the courts below held that the conspiracy of which defendants were convicted could not be submitted to a jury to connect the defendants causatively with the refusal of the distributors to handle petitioner's cigarettes;

(c) in ruling on the sufficiency of the evidence to go to the jury the courts below excluded from evidence the ultimate facts found by the jury in the antecedent criminal case, of which this Court took note (328 U. S., at pages 798 and 803);

(d) the courts below, aside from any facts by estoppel offered by plaintiff and excluded from evidence, ignored the voluminous evidence of the good quality and salability of petitioner's cigarettes, the uniform acts of the defendants manifesting their concerted action and control of the distributors, and the uniform action of the distributors in refusing to handle petitioner's cigarettes, from which, as evidence introduced *de novo* at the trial (in numerous instances being identical with or very similar to the evidence at the criminal trial of defendants), the jury could make reasonable inferences from defendants' conduct, in light of the surrounding circumstances, as follows:

(1) petitioner's failure to secure distribution of its cigarettes was due to defendants' conspiracy, their control of the distribution system in the tobacco industry, and their direction to or tacit understanding with the controlled distributors that petitioner's brand of cigarettes specifically or as one of the class of brands in general, should not be

accepted for distribution without the consent or acquiescence of the defendants; or (2) was due to its own shortcomings, or circumstances beyond its control and that of the defendants;

(e) the courts below invaded the province of the jury by making conclusions of fact against petitioner to support their conclusion that it would be "to the last degree irrational" for the jury to infer that the defendants caused the distributors' refusal to deal with petitioner;

(f) the courts below erred in holding that petitioner had to show by *direct evidence,* such as admissions of the distributors that the defendants pressured them to refuse petitioner distribution, a causal connection between defendants' conspiracy and petitioner's exclusion from competition through the uniform refusal of distributors to handle its cigarettes, though in the antecedent criminal case the defendants had been convicted of their anti-trust law violations *solely on circumstantial evidence.*

Statutes Involved

Petitioner submits as the pertinent portions of the statutes involved the following sections of the Sherman Act and Clayton Act:

SHERMAN ACT

Section 1, Title 15 U. S. C. A.

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

commerce among the several States, or with foreign nations, is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647 § 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, Title VIII 50 Stat. 693.)"

Section 2, Title 15 U. S. C. A.

"§ 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, § 2, 26 Stat. 209.)"

Section 12, Title 15 U. S. C. A.

"§ 12. Words defined.

'Antitrust laws,' as used in sections 12, 13, 14-21, 22-27 of this title, includes sections 1-27, inclusive, of this title.

'Comerce,' as used in sections 12, 13, 14-21, 22-27 of this title, means trade or commerce among the several States and with foreign nations, * * * (Oct. 15, 1914, ch. 323, § 1, 38 Stat. 730.)"

CLAYTON ACT

Section 15, Title 15 U. S. C. A.

"§ 15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendent resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731.)"

Section 16, Title 15 U. S. C. A.

"§ 16. Judgment in favor of Government as evidence; limitation of actions.

A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendent has violated said laws shall be prima facie evidence against such defendent in any suit or proceeding brought by any other party against such defendent under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of

action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof. (Oct. 15, 1914, ch. 323, § 5, 38 Stat. 731.)"

Statement of Case

Respondents' Conviction of Anti-trust Law Violations.

Petitioner brought its action for treble damages against the respondents after they had been convicted of unlawful combination and conspiracy in restraint of interstate and foreign trade and commerce in tobacco, monopolization of interstate and foreign trade and commerce in tobacco, and unlawful combination and conspiracy to monopolize interstate and foreign trade and commerce in tobacco, in violation of the Sherman Act, 15 U. S. C., Sections 1 and 2, on Criminal Information #6670 in the United States District Court for the Eastern District of Kentucky, said conviction having been affirmed by this Court, *The American Tobacco Company, et al.* v. *United States,* 328 U. S. 783.

The final judgment of conviction in that case was at Lexington, Kentucky, and is hereinafter referred to as the Lexington Judgment. The respondents contended in this Court that it was error to deny their motions for directed verdicts, because *there was no direct evidence of agreement,* or even of communication, by or among the alleged conspirators. This Court observed, however, that the criminal verdicts against respondents indicated that the results of their informal and flexible practices were so beneficial to them in protecting their common interests against those of competitors that (328 U. S. at page 793)

> "entirely from circumstantial evidence, the jury found that a combination or conspiracy existed among the petitioners from 1937 to 1940, with power and intent to exclude competitors to such a substantial extent as to violate the Sherman Act as interpreted by the trial court."

The Wide Departure of the Courts Below from Established Procedure in Treble-Damage Cases.

Nevertheless, the Court below has made a wide departure from the established procedure relative to the quality of evidence sufficient to sustain a *prima facie* case for a treble-damage plaintiff, by requiring the plaintiff to establish the cause of action by *direct evidence,* in face of the previous conviction of the treble-damage defendants for violations of the Sherman Act on *circumstantial evidence.*

The courts below have also construed Section 5 of the Clayton Act (15 U. S. C., Section 16) so narrowly as to deprive petitioner of the maximum *prima facie* evidence intended to be given to a treble-damage plaintiff by reference to a final judgment of conviction of Sherman Act violators; and have denied to petitioner the maximum advantage afforded by the estoppel doctrine, *Emich Motors Corp. et al.* v. *General Motors Corp. et al.,* 340 U. S. 558, 568-569.

The effect of the decision of the Second Circuit Court of Appeals affirming dismissal of petitioner's complaint, is, therefore, that as high precedent it creates confusion and uncertainty in the administration of the anti-trust laws and the prosecution of remedies by private suitors under those laws, because it conflicts with its own prior decisions in other cases, the decisions of this Court in the case of *Eastman Kodak Co.* v. *Southern Photo Material Co.,* 273

U. S. 359, 375, *Emich Motors, supra,* and other cases, and with a decision by the Court of Appeals for the Third Circuit, all of which are more fully adverted to hereinafter and in the Brief in support of this petition.

The importance of the *Questions Presented* is not limited to the unique facts of petitioner's case, but involves questions of law of application to treble damage cases in general, which petitioner submits should be settled by this Court to avoid frustration of the intent of Congress to ease the burden of a small concern like petitioner by providing it with as potent and effective remedies as possible against the violators of the anti-trust laws.

In the *Emich* case this Court recognized this intent of Congress, and petitioner now urges that this Court take under consideration the distortion of the beneficial purpose of the Clayton Act and of established evidentiary procedures, to the distressing detriment of petitioner, in view of the nature of its claim.

Nature of Petitioner's Claim.

Petitioner's claim in substance was that the respondents as the major manufacturers of the burley tobacco type of cigarette effectuated the monopolization of interstate and foreign trade and commerce in tobacco products and their conspiracy to monopolize such commerce in tobacco products by so dominating and controlling the distributive mechanism of the tobacco industry that they caused the distributors to refuse to buy, deal in or accept for distribution petitioner's at least equally good quality, non-burley, salable cigarette with the result that petitioner was prevented from competing with the respondents and was forced to suspend its operations.

In 1938, which was during the period of operation of respondents' conspiracy as charged by aforesaid Information #6670, petitioner was organized as a New York corporation. It had some fifty stockholders and capital of $25,000. In the spring of 1939 it started to sell its Monticello cigarettes and smoking tobacco.

Previously, in 1937, Frank Riggio had severed his connection with respondent, The American Tobacco Co., as its director of sales and had organized the Riggio Tobacco Corporation. Frank was the son of respondent Vincent Riggio, who served American over a period of some forty years in various capacities, including President of the corporation, and who was convicted at Lexington with the other respondents.

The Riggio Tobacco Corporation manufactured the Regents cigarette of which it secured distribution in 1939 and subsequent years by the controlled distributors of the respondents at the very time that they refused distribution to petitioner's Monticello cigarette, notwithstanding it was being ordered by the retail outlets served by the distributors.

Petitioner predicated its complaint on the Criminal Information on which respondents had been convicted at Lexington and attached a copy of it as exhibit "A" (R. 6-36, 34-65). It also attached to its complaint as exhibits "B", "C" and "D" copies of the documents showing that after the decision of this Court, the judgment of conviction had become final. The allegations of the complaint were substantially identical with those of the Criminal Information (R. 13-18, 6, 35, 47-52, 24-26, 54-56, 28-30, 61-63, 13 f. 39; 24, f. 72; 28-29 f. 87; 25, f. 74-75; 29 f. 86-89, 16 f. 37-48; 16-17, f. 50-53).

Should certiorari be granted, petitioner in its brief will more fully summarize the allegations of its complaint but, summarily stated, its claim was in substance as follows;

The effect of the violations of the anti-trust laws charged by the Criminal Information against the respondents was to make the income of petitioner and other manufacturers of tobacco products lower than it otherwise would have been, and with respect to the petitioner's interstate and foreign trade and commerce in tobacco products, the effect was to cause the distributors controlled by the respondents to refuse to accept the tobacco products of the petitioner in inerstate trade and commerce and to refuse to distribute petitioner's tobacco products, with the direct consequence that petitioner was unable to distribute its products except in negligible quantities, and was unable to distribute them at a profit so that it was compelled to curtail its production and distribution, and lost sales and profits which it otherwise would have made in fair competition, to its substantial damage, the amount of which was to be found by the jury (R. 18-20, f. 54-49; 26-27, f. 76-81; 30-32, f. 88-93; 217, f. 650).

The Position of the Respondents.

At the trial and in the court below, the respondents maintained in substance that they did not cause the distributors to refuse distribution to petitioner; that the final judgment of conviction was not available to petitioner as *prima facie* evidence under Section 5 of the Clayton Act because the Criminal Information alleged a number of means employed by respondents to effectuate the conspiracy, and from the general verdicts rendered by the jury it could not be determined what means the jury found the respondents employed

to effectuate their conspiracy; and that the conspiracy with which respondents were charged at Lexington dealt merely with price-fixing and price control and not with the exclusion of competitors, with the result that the final judgment of conviction could not serve to provide by estoppel evidence of the exclusion claimed by petitioner. Contending that there was no evidence to show that they actually excluded petitioner or other competitors, and that petitioner failed because of its own inadequate management, the respondents asserted that the petitioner had not adduced against them evidence sufficient to make a *prima facie* case.

The Two Types of Evidence Offered by Petitioner to Make Its *Prima Facie* Case.

Though at the outset of the trial petitioner attempted to secure as large an advantage as the estoppel doctrine would afford had the Government brought suit, *Emich Motors Corp., et al.* v. *General Motors Corp. et al., supra,* it was forced during the more than ten weeks of trial to adduce its own evidence to establish *de novo* the conspiracy of which respondents had been convicted at Lexington, before the trial court would admit into evidence the Lexington judgment (PX 59, R. 3291).

By the time the Lexington judgment was finally received in evidence, petitioner had obviously made a *prima facie* case of conspiracy against the repondents because all of petitioner's witnesses had testified, with the exception of Donnell whose testimony was later read from the Lexington Record, Peper, whose deposition was read, Hollingsworth, Lasley and Tennant, whose testimony had commenced but was not complete, and all of petitioner's exhibits (PX 1-220 inclusive) had been ruled on by the trial court and for the most part received in evidence.

Thus petitioner without benefit of numerous evidentiary facts by estoppel from the Lexington record, had adduced its own evidence to establish *prima facie:*

(1) A combination and conspiracy by the respondents to control distribution and exclude actual and potential competitors in the tobacco industry, in substance as charged by the Information at Lexington and found by the jury there;

(2) The impact of the combination and conspiracy on petitioner, with the consequence that distributors refused to handle its cigarettes and smoking tobacco so that petitioner was excluded from competing with the respondents.

Lexington Judgment Admitted for Limited Effect After Testimony by Individual Respondents Admitting Their Conviction.

Petitioner's evidence *de novo* included a great deal of matter that was not presented to the jury in the Criminal case at Lexington, and the Trial Court admitted the Lexington judgment into evidence only after the respondents Riggio, Andrews and Hahn, called as adverse parties by petitioner, had admitted that they had been convicted of the violations of the anti-trust laws charged by the Criminal Information at Lexington (R. 917-919; 898-901; 1121-1122). Even then, the Lexington judgment was admitted with instructions to the jury that the only effect they could give to it was the fact that the respondents had been convicted of unlawful combination and conspiracy in restraint of trade, monopolization of and conspiracy to monopolize, interstate and foreign trade and commerce in tobacco; in other words, the bare, general charges of the Criminal Information that

respondents had violated the anti-trust laws (R. 899-900, ff. 2697-8; 901, ff. 2701-2; 3291, 3294-5).

Petitioner would, therefore, emphasize that the erroneous dismissal of its complaint is actually in face of the evidence adduced by petitioner and received by the Trial Court, and is not confined merely to the refusal of the courts below to grant to petitioner the maximum *prima facie* evidence to which it was entitled under Section 5 of the Clayton Act.

It is the position of petitioner that, independent of the numerous facts that it might have presented to the jury through instructions of the Trial Court as to the effect of the Lexington judgment, which were not accorded to petitioner, it adduced uncontroverted *prima facie* evidence sufficient to require submission of the case to the jury. Much of petitioner's evidence was identical with or substantially similar to the evidence adduced by the Government in the Criminal trial at Lexington, but, on the other hand, a considerable portion of petitioner's evidence was completely new, particularly in respect to petitioner's competition with the respondents and their motives for excluding it. The substance of petitioner's evidence is hereinafter summarized.

As Evidence of Respondents' Conspiracy, Power and Intent to Exclude Competitors, the Lexington Judgment Was Properly Offered.

At the outset of the trial petitioner sought, through its offer of the Lexington Judgment, to establish respondents' conspiracy to exclude competitors by controlling the distributive system and their power and intent to exclude actual and potential competitors, but was refused by the trial court (R. 120-3, 137-8, 168-9, 169-177, 183-4, 192-4). So con-

firmed was it in its view that petitioner could not advance the judgment as part of its chain of proof of exclusion by respondents, that at the time of admitting this final judgment of conviction for very limited effect, the trial court stated to the jury that it established *only* that respondents had combined to acquire or maintain the power to exclude by price-fixing, actual and potential competitors *other than the petitioner, Monticello Tobacco Co.* (R. 3291, 3294-5).

The case of *The American Tobacco Co. et al.* v. *United States, supra,* did *not* as a matter of fact or law determine that there had not been an actual exclusion of competitors by the respondents. The only question which this Court accepted for review in that case was, whether it was necessary for the Government to establish the actual exclusion of a competitor by the respondents in order to obtain their conviction for the crime of monopolization under Section 2 of the Sherman Act (328 U. S., p. 704). This Court did not disturb the findings, determinations and judgments of the courts below, but merely held that offer of proof of an actual exclusion was not necessary to establish monopoly and the respondents' intent to exclude competition (328 U. S., pp. 810, 813-815).

In so holding this Court (328 U. S., pp. 811-12) approved the following statement in the opinion of the Second Circuit Court of Appeals in the case of *United States* v. *Aluminum Company of America,* 148 F. 2d 416:

> "It insists that it never excluded competitors; but we can think of no more effective exclusion than progessively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."

Petitioner maintained the position that in consonance with the foregoing exposition of "effective exclusion", it was "excluded" or the victim of "exclusion", because under the Clayton Act, Section 13 (a), 15 U. S. C., the respondents had violated the prohibition of the statute: "to prevent competition", potential or actually embarked on by a newly born business enterprise.

Petitioner took the position, therefore, that all facts were available to it from the Lexington Record to establish respondents' control of distribution of tobacco products and their intent to exclude competitors in the tobacco industry, as evidence from which the jury could infer their preconceived exclusion of petitioner as a potential or actual competitor, against which they conspired with intent to exclude and succeeded in excluding through their control of the distributive mechanism of tobacco products (R. 122-26, 131, 133-38, 146-8, 156-8, 160-162).

The narrow effect given by the trial court and the court below to the Lexington judgment deprived petitioner of the maximum *prima facie* evidence available to it according to the intent of the Clayton Act, Section 16, Title 15 U. S. C., and petitioner was restricted to an abortive *prima facie* case, with the consequence that its available proof was constrained to less than the full cause of action pleaded in its complaint; especially as the Criminal Information (Exhibit "A" attached to Complaint) set forth the intent and uniform acts of the respondents to control the sale and distribution of cigarettes and tobacco products on a national scale, and the intent to maintain a monopoly for the purpose of excluding actual and potential competitors individually and as a class.

Denial by Courts Below to Petitioner of the Ultimate Facts Determined by Lexington Judgment.

During the course of the long trial, petitioner sought to have admitted into evidence, by means of instructions to the jury, the following ultimate facts which this Court in its opinion in *The American Tobacco Company* case, *supra,* observed that the Lexington jury had found:

> That the respondents conspired to fix prices and to exclude undesired competition in the distribution and sale of their principal products (328 U. S., p. 803).
>
> That the respondents conspired to monopolize to a substantial degree the tobacco leaf market and the cigarette market, and to fix and control prices and other material conditions relating to the distribution and sale of the products of leaf tobacco in the form of cigarettes (328 U. S., p. 798).
>
> A power and intent upon the part of the respondents to exclude competition to a substantial extent in the tobacco industry (328 U. S., p. 798).

Petitioner attempted to rely on the estoppel doctrine as much as possible and to secure from the opinion of this Court in *The American Tobacco Co. case, supra,* and the opinion of the Sixth Circuit Court of Appeals in that case (147 F. 2d 93) all facts demonstrating the respondents' control of distributors and their intent to exclude competitors in the tobacco industry. Specifically in this regard, petitioner offered page 113 of the Report of the Sixth Circuit Court of Appeals opinion, to show how dealers were under the compulsion of the respondents and yielded to their demands because they felt the business necessity of carry-

ing the cigarette brands of the respondents, but it was excluded (PX 60 Id., R. 847).

With respect to the Fourth Count (conspiracy to monopolize) of the Criminal Information, this Court observed that though there was no issue of fact or question as to the sufficiency of the evidence before it, it was necessary to summarize the principal facts of respondents' conspiracy to monopolize certain trade, as charged in the Fourth Count and said (328 U. S., at p. 789):

> "* * * These facts demonstrate also the vigor and nature of the intent of the petitioners to exclude competitors *in order to maintain that monopoly if need or occasion shall offer itself to attempt such an exclusion*". (Petitioner's emphasis).

The trial court refused, however, to recognize the above-mentioned ultimate facts, or any other evidentiary facts established at Lexington, as appropriate evidence for the jury on the issue of respondents' exclusion of petitioner from competition. Petitioner was, therefore, compelled to prove *de novo* the same pattern of concerted action by the respondents that had already been established by circumstantial evidence at their criminal trial. This proof *de novo*, together with the other original evidence of petitioner, which had no forerunner at Lexington, was urged upon the courts below as sufficient to raise issues of fact for determination pursuant to the reasonable inferences by the jury.

The Substance of Petitioner's Evidence Warranting Submission to the Jury.

The opinion of the court below leaves the impression, however, that there was nothing in the trial court from which a jury could reasonably infer that the respondents

caused distributors to refuse to handle petitioner's cigarettes. The very brief reference to a few facts, apparently considered to be unfavorable to petitioner, and the lack of attention to the weight of the voluminous uncontroverted evidence from which the jury could infer numerous facts most favorable to petitioner (e.g. the quality of its cigarette, the adequacy of its management, the subservience of the distributors to respondents) present a most incomplete picture of the situation.

Accordingly, though petitioner does not pray the privilege of certiorari to secure this Court's determination of the particular facts of its case, it believes that it is essential for this Court to be apprised of the substantial evidence, which raised factual issues that could be reasonably resolved by the jury.

If this Court issues certiorari, petitioner will set forth in its Brief a comprehensive statement of facts with references to supporting pages of the Record. Petitioner believes that at this point it is not necessary to burden this Court with the more exhaustive examination of the Record which it might be disposed to make, upon hearing oral argument and reading the briefs of the parties, after the granting of certiorari.

Respondents' Control of Distributors.

The admissions of the individual respondents, called as adverse parties by petitioner, brought before the jury the fact that they had been convicted of conspiracy in restraint of trade, monopolization, and conspiracy to monopolize, relative to interstate and foreign trade and commerce in tobacco. The subsequent admission of the Lexington judgment established that fact as to the corporate respondents.

From the testimony of the individuals and petitioner's exhibits, there was also uncontroverted evidence that the corporate respondents controlled jobbers, chain stores and large retailers by the device of the "direct list", which meant persons to whom they sold their cigarettes directly, at the same wholesale price, and at a discount of 10% and 2%. The respondents would remove from their direct list any customers who would buy cigarette brands at the same price and discriminate against a brand of the respondents by selling it at a higher or lower price. It was a serious thing to be removed from the direct list, and over a long period of years respondents had not found it necessary to remove customers from their direct list very often, though such well-known organizations as United Cigar Stores and the Daniel Reeves stores had been removed and reinstated after compliance with respondents' requirements.

By the testimony of the individual respondents as adverse parties, and through copies of many of the Government's exhibits which had been received in evidence in Lexington, petitioner also adduced before the jury a collocation of circumstances establishing *prima facie* conspiracy by the respondents as follows:

I. The direct list customers of the corporate respondents were virtually identical.

II. The wholesale list prices of the corporate respondents were identical from 1928 to 1946.

IIII. The corporate respondents changed their list prices simultaneously.

IV. The trade and cash discounts of the respondents American Tobacco, Liggett & Myers, and Reynolds, have been identical since 1928.

V. Changes of the corporate respondents' list prices have no relation to cost of production or economic conditions.

VI. Respondents dictated the wholesale and the retail prices of their products by utilizing "cut-raters".

VII. Respondents gave dealers direct list privileges of purchase, together with discounts, posters, advertising displays, free goods and inventory adjustments.

VIII. Respondents used threats and penalties to enforce compliance with their program, removing dealers from their direct lists, policing and dictating both wholesale and retail prices.

IX. In furtherance of their common plan to monopolize the industry, the respondents utilized and maintained identical trade associations.

X. The individual respondents were motivated by identical by-laws of their respective companies providing for payments to them of large bonuses based upon a percentage of earnings.

Petitioner's evidence also showed that the individual respondents, who were officers of the corporate respondents, knew each other and leading jobbers or distributors, whom petitioner approached, for some thirty to forty years. Respondents Vincent Riggio and Andrews had been employed by the respondent American for some years prior to the dissolution of the Old Tobacco Trust in 1911 (*The American Tobacco Co. case, supra,* 328 U. S. 783, footnote at page 792).

The Metropolitan Tobacco Co. of New York City, a jobber which serviced 30,000 retail outlets and refused distribution to petitioner, had been doing business with the respondents for some 39 years dating back to the Old Trust,

and during the course of respondents' conspiracy held valuable cigar franchises from respondent American or its subsidiary American Cigarette and Cigar Co.

With particular respect to respondent American, it was demonstrated that it had control of the Metropolitan Tobacco Co. sufficient to cause the discharge of a branch manager of its subsidiary, New Jersey Tobacco Co., because respondent Riggio was dissatisfied with his handling of a promotion campaign for one of American's cigar brands.

Albert H. Gregg, head of Faber, Coe and Gregg, Inc., another large distributor of tobacco products, which refused petitioner, started his tobacco industry career some fifty years before trial with a subsidiary of the respondent American group and when his own business was incorporated in 1922, both the president of respondent American's subsidiary, American Cigarette and Cigar Co., and the president of respondent Liggett & Myers, purchased substantial blocks of its stock. Since his college days, Gregg was a personal friend of George Washington Hill, the president of American before respondent Riggio became its president. He was a director of respondent American from March 17, 1938 to November 29, 1939, from the middle thirties until 1940 or 1941 was on the board of its subsidiary, American Cigarette and Cigar Co., and for a number of years up to the time of trial, both he and Faber, Coe & Gregg, Inc. each owned several thousand shares of stock in respondent American or its subsidiary American Cigarette and Cigar Co. During the course of respondents' conspiracy, Gregg collaborated closely with Hill as president of respondent American concerning control of distributors of the products of American and American Cigarette and Cigar Co.

During the course of respondents' conspiracy and monopolization, there were 1,000,000 retail outlets for the sale of tobacco products, and approximately the same 6,000 distributors, dealers and large chain store organizations were on the "direct list" of the respondents American and Liggett & Myers. To reach the million retail outlets in the United States, all manufacturers, whether large or small, have to sell through jobbers or distributors, because no single manufacturer has an organization large enough for the purpose.

The distributors approached by petitioner were on the direct lists of respondents American and Liggett & Myers.

Petitioner as Respondents' Competitor for Public Taste.

Respondents were the major long established manufacturers of cigarettes made of burley tobacco or containing burley as a substantial component (see *The American Tobacco Case, supra,* 328 U. S., footnote 7 at pp. 792-3).

With its non-burley Monticello cigarette, first offered for sale in the spring of 1939, petitioner appealed to public taste for a mild, unadulterated cigarette of pure blended Virgina and Turkish tobaccos, free of artificial flavors and the large bitter weed known as burley. In each of its cigarette cartons, petitioner enclosed a "Statement of Facts" explaining how the burley cigarette caused husky throats, unpleasant aftertaste and disagreeable odor. Respondent Riggio admitted that when he was president of respondent American, he became aware of this competitive challenge, which emphasized that at the price for which the burley blends were sold, the consumer could not expect better quality.

As early as 1931, respondent American manifested its sensitivity to competition from a pure, unadulterated to-

bacco brand, when it forbade Hartley (who became president of petitioner in 1938) to use the word "unadulterated" in promoting the sale of the Court cigarette, which American was manufacturing for him. The testimony of American's president, George Washington Hill, at the Lexington trial, which was read to the jury in the instant case, also showed that if in the competition to satisfy public taste, a new brand is manufactured that suits more than burley tobacco, the manufacturer will be forced to follow that development to compete.

With respect to price, the fact that petitioner's Monticello cigarette sold for 18¢ per pack retail, which was higher than the Lucky Strike brand of respondent American, would not deter American from enforcing its policy to keep consumers using Lucky Strikes. Hill's testimony demonstrated that whether the competing brand was small or sold at a higher or lower price than Lucky Strikes, would not deter respondent American from taking steps to correct what it called "discrimination" against Luckies; one example being the Raleigh cigarette, which at 20¢ per pack, sold higher than Luckies. Petitioner's Monticello cigarette was, therefore, clearly shown to be just as much an object of the respondent's "anti-discrimination" policy as Raleigh and other brands, even though they sold for less than respondents' brands.

The cigarette cartons of petitioner, first used in the spring of 1939, carried in bold red letters the slogan "For Your Pleasure". There was testimony that no other cigarette manufacturer had used this slogan prior to petitioner. Petitioner demonstrated respondent Liggett & Myers' appropriation of this slogan about six months later, by presenting to the jury the half-page advertisements of the

respondent Liggett & Myers in October, 1939, issues of New York World Telegram, advertising its Chesterfield cigarette and featuring the slogan "For Your Pleasure".

No other cigarette carton displayed as much advertising matter and specification of the product as the carton of petitioner.

The Quality of the Monticello Cigarette

Petitioner's cigarette was, according to the experience of customers, very nice, very mild and very pleasing to the taste, and a very good cigarette. In the opinion of its manufacturer, the Christian Peper Tobacco Co. of St. Louis, (founded 1852) it was a good cigarette, on which it thought petitioner would be able "to do a job" and with which it "had a chance to make a hit". According to Crean, a long-experienced tobacco merchant, and a small stockholder of petitioner, who handled it with increasing sales, it was an excellent cigarette, and one of the best on the market. Boyleston, a long-experienced tobacco salesman, representing petitioner, found it very mild, with no after-taste, and no bite. Petitioner's president, Hartley, had ordered from the Christian Peper Tobacco Co. a good cigarette with flue-cured tobacco and some Turkish, which petitioner got.

The quality of the cigarette and its higher retail price, afforded the dealer more profit on it than on other popular brands of the burley type, such as respondents' Lucky Strikes and Chesterfield, and Reynolds' Camels.

The cross-examination of petitioner's witnesses produced no evidence whatever to disparage the quality and salability of petitioner's cigarette in any way, and there was

no evidence to controvert the fine quality of the Monticello cigarette and its salability in various types of retail outlets.

The Adequacy of Petitioner's Management.

Petitioner's president, Richard G. Hartley, had long experience in the tobacco industry in various capacities, and caused the organization of petitioner, with a capitalization of $25,000 and offices at 655 Fifth Avenue, New York City, at a time when the trend of the cigarette market was upward. Arrangements were made with Leigh Chandler & Co., a New York brokerage firm, for sale of petitioner's capital stock. Pursuant to arrangements made by Hartley with the Christian Peper Tobacco Co. of St. Louis, Missouri, which was founded in 1852, that company manufactured for petitioner the Monticello cigarettes and smoking mixture from tobacco and other ingredients furnished by Christian Peper; petitioner supplying the cartons, labels and dies.

Between the first week in March and the middle of April, 1939, Christian Peper shipped petitioner 400,000 Monticello cigarettes, manufactured according to the formula and directions given by Hartley to that company. Hartley specified the blend and ingredients to be used, as well as the ingredients to be excluded, and there was no burley tobacco in the Monticello cigarette. Based on this first shipment of 400,000 cigarettes, Christian Peper, which had adequate leaf tobacco sources and warehouse facilities, could have readily produced 120 million cigarettes a year for petitioner, as the shipment represented nine or ten hours' production on only one cigarette-making machine. Its cigarette-making capacity to supply petitioner could have been easily increased and it had available the necessary labor.

Compared with the Riggio Tobacco Corporation, organized in 1937 by Frank Riggio, former director of sales of respondent American and son of respondent Vincent Riggio, petitioner was shown to the jury to have at least as much capacity for commencement of business and expansion. The Riggio Tobacco Corporation, while undertaking manufacture of its Regents cigarette itself with only one cigarette-making machine, made arrangements with the Universal Tobacco Co. just as petitioner did with Christian Peper, to obtain tobacco as needed; and it started business with capital of only $25,000 and "a mighty small" factory. That company did not actually start the manufacture and sale of its Regents cigarette until 1939, the same year petitioner commenced promotion of Monticello cigarettes and smoking mixture; Riggio Tobacco was given distribution while petitioner was refused.

On January 14, 1939, the New York Herald Tribune carried on its financial page a picture of Hartley and a story about the formation of petitioner for the manufacture and sale of cigarettes (PX 139). The jury was thus able to form some idea of Hartley's appearance twelve years before the trial and could appraise him on the witness stand.

Chandler, the broker who handled petitioner's stock issue, before undertaking that responsibility, received letters of recommendation from Hon. John W. Davis and from persons long experienced in the tobacco industry, attesting their personal knowledge of Hartley, his integrity, his good family connections in the leaf tobacco business and considerable knowledge of the tobacco industry, his punctuality in meeting his obligations, and even from employees of respondent American Tobacco Co., the statement that all of the relations of that company with Hartley had been satisfactory.

There was also uncontroverted evidence of his experience with the buying and selling of leaf tobacco, the retail merchandising of leaf tobacco products, his 1931 promotion of the Court cigarette, of which Faber, Coe & Gregg and other jobbers who in 1939 and later refused distribution to Monticello cigarettes, had bought substantial quantities. Hartley withdrew the Court cigarette from the market because the formula was not what he had expected and he was not satisfied with the package. · Experienced tobacconists of many years' standing and prominent in tobacco trade organizations testified as to Mr. Hartley regarding his personality, his sales talk, and to the economic fact in the tobacco industry that the *securing of distribution outlets preceded the advertising of the product;* also, to the facts that Hartley was a good salesman, his securing of 56 orders for 67,000 Monticello cigarettes in one week being an efficient selling job, and that petitioner's cigarette package was attractive, and had eye appeal compared with the packages of other manufacturers.

Petitioner's stockholders included persons of substance, and in this connection petitioner would note that the trial court excluded evidence of ability and readiness of stockholders to make further investment in the capital stock of petitioner, if it could get distribution of its products. Chandler, the broker, who became a stockholder of petitioner, had had experience in interesting investor-clients in tobacco securities, some of whom also became stockholders of petitioner.

Petitioner's procedures to promote its cigarette and smoking mixture were sound according to the testimony of experts, one of whom had long experience in the tobacco industry as the operator of retail stores and as a sales pro-

motion manager for the Philip Morris Co., and the other of whom was a business engineer, whose experience included consultation to a number of the leading companies in this country, including some dealing in food products and distributing their products in channels through which cigarettes were also distributed. According to Hollingsworth, whom the trial court regarded as a substantial witness, with knowledge of Hartley's ablity (R., ff. 10142-43), it was necessary to obtain distribution of a new cigarette before attempting extensive advertising of it. In its first year of operations, petitioner did little advertising, as was the case with the Riggio Tobacco Corp. in its first year, notwithstanding that company succeeded in getting distribution of its Regents cigarette in substantial amounts.

That petitioner did not attempt the impossible in competition, so far as costs were concerned, was corroborated by Professor Tennant of Yale, author of the book, "The American Cigarette Industry", excluded from evidence (PX 184 Id.). Tennant testified to the effect that the unit costs and expenses would be no greater for a small cigarette manufacturer than they would be for a large manufacturer. His testimony, charts and tabulations were based on the experience of the five major companies in the tobacco industry (including respondents) which compositely had 90% of the industry's sales. Petitioner's costs and its profit per thousand cigarettes for the first year of operation, were known, and, allowing for the fact that its costs would have increased at the same ratio as the costs of other manufacturers, the assumption was made that in subsequent years the same differential between sales and cost price would obtain, in conformity with the O. P. A. method of maintaining past profit ratio. In his testimony concerning petitioner's

operations, Tennant made the assumption of "an ordinary degree of management".

Neither by cross examination of petitioner's witnesses, nor in any other manner, did respondents bring before the jury any evidence that the steps taken by petitioner to secure distribution were not normal or were unsound, or that petitioner's management was not *at least* of reasonable competence.

Sales Promotion of Petitioner's Cigarette

Petitioner arranged with several long-experienced tobacco and cigarette salesmen to promote the sale of Monticello cigarettes and smoking mixture. They knew many retailers personally and the best locations in New York City to select for "high-spotting", meaning promotion of tobacco products in cigarette and cigar stands located where quality merchandise could be sold. Customers were "sampled" by being handed cigarettes to smoke in the presence of the operators of the stands. Their reaction to the cigarette was favorable, and the owners or operators of the stands placed orders for petitioner's cigarette with their regular jobbers or distributors, pursuant to the trade practice either to fill out requisition sheets furnished to them by jobbers, and on occasion even to telephone orders to them. A customer a day for a retail stand would mean a carton a week or 52 cartons a year, and would be absolutely enough to induce the dealer to stock the cigarette. The object of petitioner's salesmen at the outset was to get the retail dealers to take at least one carton. The dealers were not particularly "fussy" and would sell a cigarette if they had a demand for it.

Many orders were placed by dealers with Metropolitan Tobacco Co. and other jobbers regularly servicing them, but when petitioner's salesmen returned to the dealers a week or so later, they found that the jobbers had not filled the orders. The established trade practice in the tobacco industry is for retailers to order all their cigarette requirements, other tobacco products, and sundry items such as candy and chewing gum, from jobbers who secured their stocks directly from the respondents and other manufacturers. The manufacturers did not sell or ship their products directly to the retail outlets, of which there were approximately 1,000,000 in the United States, serviced by some 6,000 distributors.

Petitioner's evidence also established that long-experienced tobacconists handled Monticello cigarettes, received repeat orders from their customers, but could not get them from the Metropolitan Tobacco Co., or from its subsidiary, the New Jersey Tobacco Co.

Refusal of the Jobbers to Give Petitioner Distribution.

Hollingsworth estimated that petitioner could have sold 120,000,000 Monticello cigarettes in its first year, if it had gotten distribution (R. 3451). In 1939, the first year Riggio Tobacco Corporation offered its Regents cigarette, it sold 100,000,000, with Frank Riggio as its only salesman. Testimony by him as to his company's sales for subsequent years was excluded (R. 1851, f. 551; 2773-74, 2780-82, ff. 8344-45) and petitioner submits this was error.

Petitioner's president, Hartley, early in 1939 was persistent in his efforts to get Metropolitan Tobacco Co., servicing 30,000 retailers, to accept orders for the Monti-

cello cigarette from its customers. Metropolitan was requested merely to fill the orders, which petitioner undertook to procure, and the distribution by Metropolitan would require no investment by it. The mere filling of the orders from its customers would yield to Metropolitan (and all other jobbers) discounts of 10%, 5%, and 2%, which were more than respondents' brands afforded. After being put off on several occasions by Mr. Katz of Metropolitan, he finally, on October 12, 1939, wrote Metropolitan a letter (PX 107 Id.), excluded by the trial court, in which he informed Metropolitan that petitioner was in position to turn over orders for his products to Metropolitan from its regular customers, that petitioner planned to cover New York, New Jersey and the New England states thoroughly with salesmen, and requested Metropolitan to accept the orders, inasmuch as petitioner was receiving calls at its office from consumers inquiring where they could purchase petitioner's products. This letter also pointed out that Metropolitan had not yet accepted an order for petitioner's products. Though Katz, who subsequent to 1939 became president of Metropolitan Tobacco Co., testified that he had been unable to find the original of this letter in the files of Metropolitan, he did not deny Hartley's testimony that after this letter was sent, Hartley had discussed it with him (R. 2038-2044, 2048-2049, 1804).

Katz testified that he could not recall as to whether or not he had ever smoked a Monticello cigarette, but that Metropolitan did not refuse to buy or distribute Monticellos because of any inadequacy of the cigarettes, their package, or the cartons in which they were sold (R. 1821-23). Over petitioner's objection, he testified on cross examination that Metropolitan did not handle petitioner's products because

its directors thought they could not make money on them; but at no time did Katz, who had been called as a hostile witness by petitioner, claim that in 1939 or at any later time this reason for not handling petitioner's cigarettes and smoking mixture was given to Hartley (R. 1813-14). Metropolitan did, however, buy in substantial quantities the Regents cigarette of Riggio Tobacco Corporation at the time that Monticello was being refused (PX 106, 109), and its subsidiary, New Jersey Tobacco Co., even conducted a specialized distribution campaign for Regents (R. 1447-48). Kimmerly, a former branch manager of New Jersey Tobacco, testified that, although he had calls for Monticello cigarettes, he could not handle them because it was an "outside brand" (R. 1446).

There was also uncontroverted evidence that respondent Vincent Riggio was definitely interested in seeing that Riggio Tobacco Corporation succeeded with its Regents cigarette, and expressed himself as appreciative of help that his son Frank, a witness called by petitioner, and his other son, Louis, were receiving from the retailers to start the brand. Respondent Riggio had, however, testified that he never discussed Regents with anyone (R. 1558-59, 1560-62). The subject of the Regents cigarette was also discussed by George Washington Hill, American's president, and respondent Hahn, a vice-president, who since April 1951 was president of American. Hahn, at the time of the trial was also president of American's subsidiary American Cigarette and Cigar Co. (R. 1273, 1101-4).

Petitioner's president, Hartley, was familiar with the operation of the different kinds of cigar and cigarette stands owned or controlled by Faber, Coe & Gregg, having helped that company break in clerks in years past, and for many

years knew the executives and employees of that company. He approached Both, President, and Schofield, Vice President, as soon as petitioner received its first shipment of cigarettes from Christian Peper, but they said they couldn't buy any, even though petitioner's price, after 10% trade discount, 5% special discount and 2% cash discount, was $6.37 net per 1760 cigarettes, giving Faber, Coe better profit than respondents' brands.

Hartley laid orders (PX 103) from 63 leading hotels and clubs in New York City on Both's desk, requesting the filling of at least a few, because the accounts ordering, as buyers of all their merchandise at Faber, Coe, could not buy elsewhere. In addition to the orders indicated in PX 103, others were sent in to Faber, Coe & Gregg by telephone or on regular weekly forms used by the stands. He also had orders from stands in office buildings and restaurants, and told Both that the amounts of merchandise indicated were wanted. In some cases, though the orders were written down or telephoned in Hartley's presence, they were either not filled by Faber, Coe & Gregg, or were filled for less than the amounts ordered. Hartley actually rechecked every order and found that the operators of the Faber, Coe & Gregg stands had not had their orders filled. Eventually Faber, Coe & Gregg did stock Monticello cigarettes in their warehouse, but over a period of two years its purchases were less than $300.00, and it would not receive the cigarettes for distribution, in one instance informing a restaurant which ordered them, after seeing them at a Faber, Coe & Gregg stand, that it was not available through Faber, Coe & Gregg to its established wholesale straight accounts (PX 94).

Neither Gregg nor Schofield had anything disparaging to say about petitioner's cigarettes and smoking mixture, its management, or its methods of attempting to secure distribution.

Crean, who operated a stand at the Fiske Building, 250 West 57th Street, New York City, heard about Monticello cigarettes from a customer in his building, who thought them a very good cigarette. He ordered several cartons from his supplier, Faber, Coe & Gregg, and on reorders of two or three cartons, he received delivery from Faber, Coe for the first two months. As sales increased he displayed Monticello cigarettes on the top of his case, and began to order by the thousands (5 carton lots) because Monticello's were getting consumer acceptance, but Faber, Coe would send him only two cartons and back order him for three. His sales increased to the point where he had to have at least a thousand or two thousand Monticellos on hand, so he telephoned Faber, Coe & Gregg's shipping department, explaining he was losing sales and was told "you will get them when we get them". On one occasion when Crean told Joseph Laven, representative of Faber, Coe & Gregg, what a good cigarette Monticello was, he was asked what he was doing with that "so and so up there" referring to a Monticello carton on Crean's showcase. Crean explained that it was selling well, he had lots of customers for it, but his difficulty was his inability to get them and Laven "finished up with a laugh" (R. 279-80).

His inability to obtain Monticello cigarettes from Faber, Coe & Gregg led to his making the acquaintance of petitioner's president, Hartley, because he finally had to call petitioner's office to get 2000 cigarettes needed by him, and Hartley delivered them personally (R. 280-284). Though

he continued to order Monticellos from Faber, Coe & Gregg, he never received any more, and ordered Monticellos directly from Hartley in 2000 to 5000 cigarette lots until he gave up his stand. While petitioner was supplying Crean directly with Monticello cigarettes, he tried to get them from Metropolitan Tobacco Co., but received neither the cigarettes nor an explanation from Metropolitan.

The fact that the New York jobbers who distributed respondents' brands would not fill orders for Monticello cigarettes from their regular retail customers, was demonstrated by the testimony of Crean and Hartley in substance as follows: Crean, posing as one of petitioner's salesmen, on a Saturday afternoon went with Hartley from 57th Street up Broadway to 76th Street and back in New York City, and during a three hour period obtained about 30 retail stores' orders for 50,000 Monticello cigarettes. He then told Hartley to try and deliver these orders through the jobbers. Returning the following Saturday afternoon with Hartley to the same retailers, who were all store keepers carrying all the leading cigarette brands, they found that none of them had received any Monticello cigarettes.

Crean could have sold 4000 Monticello cigarettes a week all through 1940 if he could have gotten all the Monticellos he ordered per week. Ordering them direct from petitioner was not as practicable as being able to get them, like the respondents' brands, from distributors like Metropolitan Tobacco Co., Faber, Coe & Gregg, and others. Irregular deliveries made him lose sales. Based on his experience with other brands and on the consumer reaction to Monticellos, the sales of Monticello cigarettes would have increased with the passing of time (R. 483-86, 489, 4191-2).

Prior to commencement of petitioner's action, a representative of respondent, The American Tobacco Co., visited Crean, who informed him that the Monticello cigarette had very good repeat business, and customers would be steady smokers of it, if they could purchase it at any other places than just Crean's stand. Crean also told this representative of respondent American that he felt that the Monticello cigarette would have had an excellent opportunity of becoming a very high type and good selling cigarette, because the consumer was looking for a mild brand (385-86, 389).

Also, Monticello cigarettes afforded a better profit incentive to the average retailer, because they were not "cut rate" or "underselling legitimate profit" (R. 389-90).

There was definite consumer acceptance of the Monticello cigarette, which was sold in establishments like the Schrafft's stores, Pennsylvania Drug stores, the Savarin Restaurant at the Pennsylvania Station, New York City and outstanding buildings like the Equitable Building, 120 Broadway, New York City. Chandler introduced it to clubs in New Jersey where it was well received and resulted in orders from New Jersey distributors. Neither Metropolitan Tobacco Co., Faber, Coe & Gregg nor other large distributors in New York City and Albany (where Hartley accompanied by Chandler went to promote the cigarette), nor other distributors in Philadelphia, Baltimore, Washington, Richmond and Norfolk, Virginia, and other places, would even fill the orders for Monticello cigarettes obtained by Hartley from retail outlets which were regularly serviced by them.

There was no evidence that the distributors, who were the "direct list" customers of respondents, refused to handle petitioner's products because of any criticism of, or defi-

ciency in, their quality, petitioner's management, Hartley individually, their price, acceptance by consumers, or petitioner's methods of marketing them.

After endeavors to secure distribution of its Monticello cigarettes and smoking mixture over a period of more than two years, which met with uniform refusal by the distributors, petitioner was forced to cease its efforts.

Development of, And Conditions In, Tobacco Industry

Particularly through the testimony of Prof. Richard B. Tennant of Yale (economics), whose book, "The American Cigarette Industry," contained many references to the record of the Lexington trial, petitioner presented to the jury a great deal of evidence from which it could get "some appreciation of the history and development of the cigarette industry," as essential toward understanding of the case (*The American Tobacco Co.* case, *supra,* 328 U. S., at p. 790). There were received in evidence a number of charts and tabulations, from which the jury could see the dominance of the respondents and other leading tobacco manufacturers, who had also been convicted at Lexington, as well as the costs of sales, expenses, operating profits and net income before taxes of the respondents. Sales figures of the various cigarette brands and the tobacco industry as a whole were presented together with graphs indicating the growth trends of new brands. Much of the exhibit evidence introduced through Tennant was based on figures established at the Lexington trial, as well as reports of the financial condition and operations of the respondents.

Because Prof. Tennant had not actually worked in the tobacco industry, though he had some experience with

tobacco figures in connection with services to the O. P. A., and had not personally visited and investigated the businesses of the respondents and others in the tobacco industry, the trial court struck out all of his testimony and the exhibits received in evidence through him, which petitioner will specify as error, *infra*. The volume of the Tennant testimony and the number and nature of the exhibits is apparent by reference to the Record, pages 3141 to 4053, and to the Index to the Record pages XIII to XVIII inclusive.

The background of the tobacco industry which petitioner attempted to lay before the jury through Tennant was, in substance, like the background developed at the Lexington trial, and was among those facts which the trial court refused to bring before the jury by instructions after the Lexington judgment was admitted into evidence.

From the testimony of Hollingsworth and Tennant, including tabulations prepared by Tennant, the jury had before it projections of petitioner's potential sales and the profits it could have made, had it secured distribution of its products.

Dismissal of Petitioner's Complaint and Invasion of Jury's Province By Courts Below

The trial court's dismissal of the complaint was plainly predicated on the view that the Lexington judgment could not be used to provide estoppel facts because it showed that respondents conspired only to fix and control prices as to competitors other than petitioner, and that, as a matter of fact, the respondents did not actually exclude competitors. Both with respect to the Lexington Record and all the evidence introduced *de novo* by petitioner, *the trial court held*

that the evidence showed that what petitioner claims was done to it in the way of exclusion, was never done to anyone else, and that there was, therefore, no basis for the jury to infer that respondents caused the exclusion of petitioner. The colloquy between court and counsel on motions to dismiss (R. 4240 to 4266) shows the attitude of the court, which is particularly evident from the Record at folios 12742-12744, 12746, 12761-12762, 12770-12776. It is clear that *the trial court assumed the innocence of the respondents, merely because evidence of actual exclusion of a competitor was not presented at Lexington,* assumed as a fact that respondents had at no time caused the exclusion of any competitor, and made rationalizations, which reflected the trial court's misconception of the meaning of *prevention of competition* or exclusion under the Clayton Act and judicial decisions, and which, in any event, were in the province of the jury.

Because *it seemed to the trial court* that respondents had no reason whatever to fear petitioner's operation in the tobacco field, it seemed to the court "to be to the last degree irrational to suppose that these five companies, the largest in all the world", would say to the distributors, though they never bothered before about 10 cent cigarettes and others that gave them trouble, that they were "just too much afraid to ever get" petitioner out on the market (R. 4254, 12762).

Numerous errors were made by the trial court relative to the admission and exclusion of evidence, but petitioner will keep these to a minimum in the *Specifications of Errors, infra.*

The court below, in affirming dismissal of petitioner's complaint, also invaded the province of the jury in respects designated in the *Specifications of Errors, infra.* That court

also sustained dismissal of the complaint on the grounds that the conspiracy proved against the respondents at Lexington dealt only with coercion of the distributors to maintain prices fixed by respondents; showed no coercion by respondents of wholesalers to stock certain brands; was effective as showing only previous concert or collusion of the defendants, but not as to their relevant effectuating practices, and no casual connection between such collusion and jobbers' refusal to handle petitioner's products was shown by direct evidence. These matters are covered in the *Specifications of Errors, infra.*

Thus, on trial and appeal, errors of interpretation of Section 5, Clayton Act, and of previous decisions of this Court, creation of a presumption of innocence for the respondents, assumptions of fact favoring respondents, and invasion of the jury's province, notwithstanding the presence of voluminous, substantial evidence supporting reasonable inferences that could be made by the jury, including those most favorable for petitioner on its claim of exclusion, led to the dismissal of the complaint.

SPECIFICATIONS OF ERRORS

Should a writ of certiorari issue, petitioner will urge that the Court of Appeals erred:

1. In holding that as to all matters not distinctly determined by the final judgment of conviction of the respondents at Lexington, petitioner had to adduce direct evidence, and could not rely on circumstantial evidence.

2. In holding that petitioner had the burden of proving by direct evidence any causal connection claimed by it between the respondents' conspiracy or collusion and the refusal of distributors of tobacco products to handle the products of petitioner.

3. In holding that petitioner had to establish by direct evidence, such as admissions, that the jobbers were pressured by the respondents to refuse to handle petitioner's products.

4. In holding that petitioner was not entitled, under Section 5 of the Clayton Act, to have the final judgment of conviction of respondents in evidence, to establish under the estoppel doctrine the conspiracy, power, and intent of the respondents to exclude actual and potential competitors in the tobacco industry.

5. In holding that the final judgment of conviction of respondents was not admissible in evidence to establish by collateral estoppel the various uniform acts of respondents as a basis for the jury to infer concerted action by respondents to exclude competitors.

6. In holding that in the criminal case against the respondents at Lexington there was nothing "indicating that the conspiracy was effectuated even there in a way that might have affected plaintiff".

7. In holding that the jury verdict against respondents in the antecedent criminal case at Lexington, was not firmly rooted in a finding that coercive conduct on the part of the respondents "made impossible the marketing

of petitioner's non-competing higher priced cigarettes", and, in so holding, making the factual assumption that petitioner's cigarettes were "non-competing".

8. In holding that, with respect to dealer domination by the respondents through maintenance of a distributive mechanism favorable to their products, the Lexington Judgment established that this meant "merely identical retail prices at a figure not more than 3¢ above competing lower priced brands".

9. In failing to hold that "exclusion" under the Clayton Act means prevention of competition by potential competitors or actual competitors newly entering the field.

10. By sustaining in effect the holding of the trial court that petitioner had the burden to prove that the respondents caused the actual exclusion from the market of competitors *other than the petitioner,* to make its *prima facie* case.

11. By sustaining in effect the trial court's factual assumption that the respondents did not direct, or have tacit understanding with, the jobbers approached by petitioner, not to distribute a competing brand, including petitioner's, without consent or acquiescence of the respondents.

12. By sustaining in effect the trial court's holding that the Lexington Judgment against respondents is in no way evidence that respondents did anything to cause damage to petitioner.

13. By sustaining in effect the trial court's ruling that the Lexington Judgment was evidence only to show that the respondents combined to exclude actual and potential competitors *other than the petitioner.*

14. By sustaining in effect *the trial court's ruling that the Lexington Judgment was evidence only of respondents' power and intent to exclude actual and potential competitors, solely by means of price fixing,* and in failing to hold that the Lexington Judgment established that *respondents conspired to fix and control other material conditions* relating to the distribution and sale of the products of leaf tobacco in the form of cigarettes.

15. By sustaining in effect the *trial court's factual assumption that the respondents never actually excluded competitors from the cigarette market,* and that the distributors were actuated by innocent motives in their actions toward petitioner, the effect of which was to give a conclusive presumption of innocence to respondents in the treble damage case, notwithstanding their conviction of anti-trust law violation in the antecedent criminal case at Lexington.

16. In failing to hold that "exclusion" under the Clayton Act means prevention of actual and potential competition, exercised either directly and specifically against petitioner or against petitioner as a member of the class of "competitors".

17. By sustaining the action of the trial court striking out all of the testimony of Prof. Tennant, offered as an expert or well-informed person, and all

exhibits introduced with his testimony, offered by petitioner on conditions in the cigarette industry and as assistance to the jury in determining damages.

18. By sustaining exclusion of the testimony of Frank Riggio relative to sales of the Regents cigarette by Riggio Tobacco Corporation in years subsequent to 1939, the net earnings of that corporation, and its operations generally, offered by petitioner as a comparative small business entering the field at the time petitioner did, and securing distribution of its product.

19. By sustaining in effect the trial court's action excluding from evidence exhibits offered by petitioner, to wit, PX 32 Id., PX 193 to 206 Id., inclusive, and PX 209 Id.

20. By sustaining in effect the trial court's disallowance of a question to respondent Andrews concerning any special deals that he or respondent Liggett & Myers had with jobbers.

21. By sustaining in effect the trial court's exclusion of a question to Hahn relative to the purpose of respondent American in selling its cigarettes to "cut-raters".

22. By sustaining in effect the trial court's exclusion of PX 60 Id. (P. 113 of the Report in the Sixth Circuit Court of Appeals opinion in *The America Tobacco Co., et al.* v. *United States,* 147 F. 2d 93) offered to show respondents' control of the distributors through penalties and their business necessity to have respondents' products.

23. By invading the province of the jury as follows:

(a) In effect finding as fact that petitioner's stock prospectus was false, absent the relevance of such fact (even if entirely correct, which is not conceded) to the issue of petitioner's exclusion from competition by the respondents;

(b) By finding as fact that Hartley made "an abortive attempt to market a 'Court' cigarette manufactured for him by American Tobacco Co.", and further finding that "otherwise there was nothing in his past as to either general business success or initiation into the cigarette market";

(c) By finding as a fact that petitioner proposed to market its cigarette without substantial advertising, notwithstanding the trial court's exclusion of testimony by Hartley concerning petitioner's "plan" to market its products;

(d) By finding as fact that petitioner's president Hartley was practically his own sales force, in face of the fact that petitioner also had other long-experienced sales representatives;

(e) By finding as fact that petitioner's president Hartley did not pursue direct sales to retailers "preferring to market through distributors", in the face of respondent Riggio's testimony that both large and small manufacturers had to use distributors, and Hartley's knowledge of the necessity of securing marketing through distributors;

(f) In effect making the fact conclusion from petitioner's record that no sustained management effort was made to market Monticellos on a continuing or permanent basis;

(g) Misapprehending the facts by stating in substance that Section 5 of the Clayton Act does not

permit use of a criminal judgment " 'to imply new wrong-doing from past wrong-doing' " the petitioner's case being based on exclusion in the course of respondents' conspiracy.

24. In holding that the Lexington conspiracy could not be submitted to the jury to show coercive conduct by the respondents and, to connect the respondents causetively with the refusal of the distributors to handle petitioner's cigarettes.

25. In holding on all of the evidence *de novo* actually adduced by petitioner, aside from facts by estoppel denied to it, that there was no evidence from which the jury could make a reasonable inference that petitioner was excluded from competition by respondents.

26. In holding that petitioner had to show by direct evidence, rather than by circumstantial evidence, that it was excluded from competition by the respondents.

27. By affirming the trial court's erroneous rulings, invasion of the jury's province, and dismissal of petitioner's complaint on the merits, there being no controverting evidence from the respondents.

REASONS FOR GRANTING THE WRIT

I. The Usual Reasons Acceptable to This Court Are Present

There is serious doubt as to the correctness of the decision of the Second Circuit Court of Appeals on questions important in the prosecution of remedies under the anti-trust laws, *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S.

212, 213. Said Court of Appeals by its present decision and prior decisions has created confusion in the application of Sections 4 and 5 of the Clayton Act, *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, and the case involves general principles requiring pronouncement by this Court (*idem*, page 438). The province of the jury was invaded by the action of the District Court, which was affirmed by the Court of Appeals, *Moore* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573; *Goldman* v. *United States*, 245 U. S. 474, 477.

II. The Requirement of Direct Evidence to Make the Treble Damage Plaintiff's *Prima Facie* Case, Represents a Wide Departure from Established Procedure.

There appears to be no settled body of law postulating the production of *direct evidence*, instead of the customary collocation of circumstances or *circumstantial evidence*, for the plaintiff to be able to make a *prima facie* case, warranting submission to a jury for its inferences. On the contrary, the Second Circuit Court of Appeals, this Court, and the Third and Sixth Circuit Courts of Appeal have recognized that it is *rare indeed* when conspiracy that violates the anti-trust laws can be proved by direct evidence, and have held that circumstantial evidence is adequate (the cases referred to are cited in the Brief supporting this Petition). The present decision of the court below causes confusion by being in conflict with its own prior rule and with other cases, making uncertain the remedy available to the private suitor under the Clayton Act, and in effect challenging the supervision of this Court, *which has not heretofore laid down a general rule to the effect that, with respect to all matters not distinctly determined in the antecedent criminal case, the treble damage plaintiff must prove his case by direct evi-*

dence. The effect of the wide departure by the court below from established evidentiary procedure in this type of case, is to put a premium on the skillful concealment of concerted action and to impair the substantive cause of action conferred by the statute. The aggravated nature of this effect is apparent from the anomalous situation of the Government being required to adduce only circumstantial evidence to secure the final judgment of conviction, on which the private suitor may rely under the Clayton Act for as large an advantage under the estoppel doctrine as possible.

III. The Narrow Scope and Effect Given to Respondents' Final Judgment of Conviction, by the Court Below Conflicts with the Intent of the Statute and the Rule of This Court.

As the intent of Congress in the Clayton Act was to minimize the litigation burden of the small, private suitor, who was victimized by violators of the anti-trust laws, and this Court has held in the *Emich Case, supra,* that the intent was to give such litigant the benefit of *all* matters of fact and law necessarily decided by the antecedent judgment of conviction, and as large an advantage as allowable under the estoppel doctrine, subject only to the right of the defendant to his day in court, the action of the court below in severely restricting the probative effect of the Lexington Judgment, distorts the purpose of the Act, and as high precedent, if allowed to stand, will affect in general all cases brought under Sections 4 and 5 of the Clayton Act. The numerous respects in which the final judgment of conviction was limited, have been set forth *supra,* but petitioner would emphasize that it should at the very least have been available to establish the ultimate facts of respondents' conspiracy, power and intent to exclude competitors, pursuant to this Court's observation in *The American Tobacco Case, supra,* 328 U. S., at pages 798 and 803.

IV. The Court Below Invaded the Jury's Province, Despite the Presence of Substantial Evidence Raising Issues of Fact for Decision by the Jury.

The action of the court below had the effect of giving the respondents a presumption of innocence, contrary to this Court's rule in the *Eastman Kodak Company Case,* referred to in the supporting Brief. Of general importance also in this connection, was the burden imposed on petitioner to prove that the respondents excluded *others,* while simultaneously excluding the evidence offered by petitioner to show the experience of Riggio Tobacco Corporation, comparable in size to petitioner, and which the jury could infer had the door of the respondents' monopoly opened to it because of its president's previous connection with the respondents.

In the *Statement of Case, supra,* and in the *Specifications of Error, supra,* petitioner has set forth the many invasions of the jury's province by the courts below. To effectuate the intent of Congress under the Clayton Act, this Court should pronounce that *circumstantial evidence* should suffice to establish *all* elements of a treble damage case, and that the province of the jury should not be invaded by the trial court merely because the plaintiff is unable to adduce direct evidence, due to the skillful concealment of the anti-trust law violator.

CONCLUSION

This case raises important general questions of law under the anti-trust statutes, and under prior decisions of this Court, which have been misconstrued or entirely ignored. It affects not only petitioner, but treble damage plaintiffs in general. The rule on direct evidence laid down by the

court below conceivably affects the general law of evidence in conspiracy cases. The focus of the court below on the estoppel aspects of the case, and its ignoring of petitioner's substantial evidence *de novo* also raises an important question of law. The subject matter is such that petitioner believes that this Court, in performance of the duty of administering justice, should exercise its discretion for issuance of a writ of certiorari to the Court of Appeals for the Second Circuit in respect of the questions presented by this petition.

Dated, New York City,
September 16th, 1952.

Respectfully submitted,

PHILIP HANDELMAN
Counsel for Petitioner

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHILIP HANDELMAN being duly sworn, deposes and says; that he is duly admitted to the Bar of this Court, and is attorney and counsel for Monticello Tobacco Company, Inc., the petitioner in the foregoing Petition for Writ of Certiorari; that he has read said petition and the contents thereof are true, except as to those matters alleged to be upon information and belief, and that as to such matters, he believes it to be true.

.....
PHILIP HANDELMAN
Counsel for Petitioner

Sworn to before me this
16th day of September, 1952

.....
Notary Public

LAURENCE FELDMAN
NOTARY PUBLIC, State of New York
Qualified in Bronx County
No. 03-1185650
Cert. filed with New York & Bronx Co. Clk. & Reg.
Commission Expires March 30, 1953

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Appeals for the Second Circuit, not being reported yet, is printed in the Record at pages 4289 to 4297 inclusive. No opinion was written by the District Court.

Jurisdiction

The judgment of the court below was entered on June 19, 1952, and the statutes and rules under which the jurisdiction of this Court is invoked, are set forth at the outset in the Petition.

Questions Presented

The questions presented are stated in the Petition, immediately preceding *Statutes Involved* and directly after *Jurisdiction* in the Petition.

Statutes Involved

The Sherman Act, Sections 1, 2, and 12, Title 15 U. S. C., and the Clayton Act, Sections 4 and 5, Title 15 U. S. C., Sections 15 and 16, are set forth at length immediately after *Questions Presented* in the Petition.

Statement of Case

The case has been stated at length in the Petition, commencing directly after *Statutes Involved.*

Specifications of Errors

The Petition sets forth twenty-seven specifications of errors, all of which are submitted as substantial, but to facilitate consideration of its Petition, the petitioner invites the attention of this Court particularly to numbers 1 to 6 inclusive, 10 to 16 inclusive, and 23 to 27 inclusive, with emphasis on number 23, which presents summarily specific respects in which the court below invaded the province of the jury.

Outline of Argument

Petitioner contends that the court below made three general fundamental errors, irrespective of the errors more specifically noted by petitioner:

(1) Requiring petitioner to prove by direct evidence all matters that could not be said to have been distinctly determined in the antecedent criminal case at Lexington;

(2) Depriving petitioner of as large an advantage as possible under the estoppel doctrine, by excluding from evidence ultimate facts observed by this Court to have been found by the Lexington jury, and by holding that the Lexington Judgment established only respondents' conspiracy to fix and control retail prices of cigarettes, more particularly to maintain a three cent differential between respondents' brands and the ten cent brands;

(3) Ignoring the voluminous evidence *de novo,* introduced by petitioner, *without benefit of estoppel facts,* and invading the jury's province on all of the

evidence to conclude that there was no rational basis for the jury to find that respondents had excluded petitioner from competition.

Petitioner commenced business during the course of the conspiracy of which the respondents were convicted at Lexington. Irrespective of the absence of evidence there to show that a competitor was actually barred from the market, and thus excluded, petitioner claims that respondents' conspiracy had an impact on it, because the jobbers or distributors, as controlled instrumentalities of respondents, refused to handle petitioner's product. To prove this, petitioner urges that under the Clayton Act it was entitled to take, by virtue of the Lexington Judgment, all estoppel facts that showed control of the distributors by respondents, and their power and intent, by combination and conspiracy, to exclude potential and actual, new competitors, like petitioner. Furthermore, petitioner, if denied estoppel benefits through the Lexington Judgment, was entitled to demonstrate by circumstantial evidence *de novo* the same pattern of control and power and intent to exclude as had been established at Lexington, *which it did.*

The conspiracy pattern at Lexington was one of concerted action, by uniform acts of respondents, to maintain dealer domination and thus secure the exclusion of actual and potential competitors. *The addition to that pattern in specific terms was in the instant case the evidence of the uniform refusal of the distributors to handle petitioner's fine quality, higher priced, greater profit yielding, cigarette, for which petitioner obtained and would continue to obtain the orders, if granted.*

Accordingly, petitioner contends that on all of the evidence actually admitted before the jury, and certainly on

any estoppel facts that should have been allowed to it, there was ample basis for the jury to infer respondents' exclusion of petitioner.

I.

Petitioner did not have the burden to make a *prima facie* case by direct evidence as to all matters not distinctly determined at Lexington, or as to any other matters introduced by it.

Eastman Kodak Co. v. *Southern Photo Material Co.*, 273 U. S. 359, 375
The Eastern States case, 234 U. S., 612
Bordonaro Bros. Theatres v. *Paramount Pictures, Inc.* (Cir. 2), 176 F. 2d 594, 596
Milgram v. *Loew's, Inc.*, (Cir. 3) 192 F. 2d 579, 583
American Tobacco Co., et al. v. *United States*, 328 U. S. 783, 793, 809-810
American Tobacco Co. et al. v. *United States*, (Cir. 6) 147 F. 2d 93.

II.

The Clayton Act conferred on petitioner as a small, private litigant, without requesting it to be a witness in the prior criminal anti-trust case, the fullest benefits by estoppel under the Lexington Judgment.

Emich Motors Corp., et al. v. *General Motors Corp., et al*, 340 U. S. 558, 567-569, 571.

The court below has also heretofore held that a decree under the Clayton Act is itself *prima facie* evidence of

violation of the anti-trust laws by the defendant; *William H. Rankin* v. *The Associated Bill Posters,* (Cir. 2) 42 F. 2d 153-154, certiorari denied, 282 U. S. 864.

III.

Petitioner's *prima facie* evidence of respondents' intent to exclude competitors, did not have to be based on a finding of actual exclusion of competitors in the antecedent criminal case.

> *The American Tobacco Co. et al.* v. *United States,* 328 U. S. 783, 789-790, 791, 793, 797, 798.

In *The American Tobacco Co.* case, *supra,* (328 U. S. at pp. 811 and 812), this Court quoted with approval the following statement from the opinion of the Second Circuit Court of Appeals in *United States* v. *Aluminum Company of America,* 148 F. 2d 416:

> "It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."

Nevertheless, in the present case the court below has ignored this valid concept of *exclusion through prevention of competition.* Notwithstanding this Court in *The American Tobacco Co.* case, *supra,* recognized that *entirely on circumstantial evidence,* the Lexington Jury found that from *1937 to 1940, the period during which petitioner entered the field, a combination or conspiracy existed* among

the respondents, with power and intent to exclude competitors to such a substantial extent as to violate the Sherman Act (328 U. S. 793). Observing that prevention of all potential competition was the natural program of respondents for maintaining a monopoly, this Court concluded that the Lexington Jury could have found from respondents' actual operation, the existence of a combination or conspiracy not only in a restraint of trade but to monopolize a part of the tobacco industry (328 U. S. 797 and 798).

Thus, in *The American Tobacco Co.* case, *supra,* this Court sustained conviction of the respondents, without proof of actual exclusion of a competitor through prevention of competition (328 U. S. 810), *but did not decide that in fact there had not been such exclusion.* The trial court's action in the present case affirmed by the court below *assumed as a fact* that respondents did not actually exclude competitors, and held that petitioner's *prima facie* evidence was deficient in not including proof that respondents excluded competitors *other than petitioner.* The imposition of such burden of proof on petitioner is specified as error (No. 10, Specifications of Errors in Petition).

IV.

The burden of proof of the entire case resting upon petitioner does not mean that the court should so far encroach upon the province of the jury as to require that one inference should be more thoroughly proven than another if both are reasonable and rational.

Bordonaro Bros. Theatres v. *Paramount Pictures, Inc., supra,* 596,

United States v. *Spagnuolo* (Cir. 2) 168 F. 2d 768, certiorari denied 335 U. S. 824,
United States v. *Sherman* (Cir. 2) 171 F. 2d 619.

In the present case, the court below ignored its own rule by affirming dismissal of petitioner's complaint, even though the evidence before the jury presented reasonable inferences for its choice, one of which was that respondents caused petitioner's exclusion from competition.

Furthermore, this rule was pronounced in a civil anti-trust case where the court below said "obviously a conspiracy such as was here charged rarely can be proved by direct evidence", *Bordonaro Bros. Theatres* v. *Paramount Pictures, supra,* 596.

V.

Invasion of the jury's province by the courts below was predicated on their misconception of the evidence to enable more than one reasonable inference to be drawn from it, and failure to admit evidence offered by petitioner.

"Where more than one inference can reasonably be drawn from the proof, it is for the jury to determine the proper one", *Bordonaro Bros. Theatres* v. *Paramount Pictures, supra,* 596.

The opinion of the court below indicates *its* conclusion that petitioner failed to secure distribution because of its own shortcomings, *but this Court has held it to be invasion of the jury's province for a court to conclude that failure of a treble-damage plaintiff's venture is due to its own shortcomings, rather than the anti-trust law violation charged*